Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-811

PHELPS DODGE CORPORATION and related corporations; AMERICAN SMELTING AND REFINING COMPANY (ASARCO, INCORPORATED); DUVAL CORPORATION; CITIES SERVICE COMPANY; and INSPIRATION CONSOLIDATED COPPER COMPANY,

Petitioners,

v.

THE STATE TAX COMMISSION OF ARIZONA; JOHN M. HAZELETT, L. WALDO DEWITT and BOB KENNEDY, COMMISSIONERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

LESLIE T. JONES, Jr.
DEAN C. SHORT, II
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003

Attorneys for Phelps Dodge Corporation and ASARCO, Inc.

JAMES R. MALOTT, JR.
Morris & Malott
Post Office Box 351
Globe, Arizona 85501

Attorneys for Cities Service Company

DAVID W. RICHTER
Bilby, Schoenhair, Warnock & Dolph
Ninth Floor, Valley National Building
2 East Congress Street
Tucson, Arizona 85701

Attorneys for Duval Corporation

G. HENRY LADENDORFF
Ladendorff & Ridge
34 West Monroe, Suite 500
Phoenix, Arizona 85003

Attorneys for Inspiration Consolidated Copper Company

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IN THE

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No.

PHELPS DODGE CORPORATION and related corporations; AMERICAN SMELTING AND REFINING COMPANY (ASARCO, INCORPORATED); DUVAL CORPORATION; CITIES SERVICE COMPANY; and INSPIRATION CONSOLIDATED COPPER COMPANY,

Petitioners,

v.

THE STATE TAX COMMISSION OF ARIZONA; JOHN M. HAZELETT, L. WALDO DEWITT and BOB KENNEDY, COMMISSIONERS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered in this proceeding on July 21, 1977.

OPINION BELOW

The opinion and judgment of the Supreme Court of Arizona is reported at 568 P.2d 1073 and is found in the Appendix at A. 1a.

JURISDICTION

The judgment of the Supreme Court of Arizona was entered on July 21, 1977. Timely motions for rehearing were denied on September 8, 1977, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

May Arizona administrative agencies ignore the requirements of due process of law embodied in the Fourteenth Amendment merely because such agencies' actions are subject to *de novo* judicial review?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . . . ."

Ariz. Rev. Stat. Ann. §§ 41-1011 and 43-177(f)(2) are set forth at A. 6a.

STATEMENT OF THE CASE

Petitioners are mining companies conducting business throughout the United States, including Arizona. For the years 1966 through 1968 petitioners filed Arizona income tax returns calculating Arizona's share of their total income by an apportionment formula, on the basis that petitioners were each engaged in a unitary business within and without Arizona. The Arizona Tax Commission proposed as-

sessments of additional tax for such years on the theory that petitioners should have calculated their Arizona income on the separate accounting basis, as though petitioners' business activities within Arizona were separate from and unrelated to their business activities without Arizona. Petitioners protested the proposed assessments and, following hearings of each of petitioners' protests, the Arizona Tax Commission denied the protests but did not set forth any findings of fact upon which its decisions were based. A. 7a.

Petitioners then each sought review of the administrative agency's action by filing suit in the appropriate Arizona Superior Court. Following a consolidation of petitioners' cases, the trial court granted petitioners' motion for summary judgment on the grounds that the decisions of the Arizona Tax Commission were void because the Commission failed to set forth findings of fact and conclusions of law as required by the Arizona Administrative Procedure Act, *Ariz. Rev. Stat. Ann.* § 41-1011. A. 19a.

The decision of the trial court was appealed directly to the Supreme Court of Arizona, which reversed the decision and remanded the case for trial. The Supreme Court of Arizona held that the Administrative Procedure Act was not applicable because petitioners could seek a *de novo* review of the administrative agency's action (*Ariz. Rev. Stat. Ann.* § 43-177 (f)(2)), and thus any errors made by the agency were irrelevant. A. 4a. In light of unchallenged Arizona precedent to the contrary, *e.g., State Tax Commission v. Wallapai Brick & Clay Products, Inc.*, 85 Ariz. 23, 330 P.2d 988 (1959), and the concession of respondents that the Administrative Procedure Act was specifically applicable [Appellants' Opening Brief at page 9 (A. 26a)], petitioners could not have anticipated the ruling of the Arizona Supreme Court.

Petitioners filed motions for rehearing and in said motions specifically raised the constitutional issue which is the basis for this petition: the requirement of findings of fact by administrative agencies is based upon the due process clause of the Fourteenth Amendment, in addition to the statutory mandate, and cannot be ignored merely because *de novo* judicial review is available. A. 32a. Although the general rule is that a constitutional question first raised on motion for rehearing in a state appellate court comes too late to serve as a basis for review by the Supreme Court of the United States, the rule does not extend to cases where the grounds of the decision supply a new or unexpected basis for a claim of denial of a constitutional right. *Great Northern Railway Company v. Sunburst Oil & Refining Company*, 287 U.S. 358 (1932). Prior to the wholly unanticipated decision of the Supreme Court of Arizona, petitioners relied on the express mandate of a concededly applicable statute and had no reason to base their position on the Fourteenth Amendment. Consequently, the motion for rehearing was petitioners' first opportunity to raise the constitutional issue.

Petitioners' motions for rehearing were denied without opinion by the Supreme Court of Arizona, and the case was remanded for trial in the Superior Court. Although further proceedings are thus contemplated in the trial court, the decision of the Supreme Court of Arizona is "final" for the purposes of 28 U.S.C. § 1257. In *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975), this Court set forth a pragmatic approach to the determination of finality. The procedural status of the instant case closely parallels that of the proceedings in *Cox Broadcasting*, wherein this Court found the requisite degree of finality.

As in *Cox Broadcasting*, the decision of the Supreme Court of Arizona is clearly final on the constitutional issue and is not subject to further review in the state courts. Although petitioners may prevail at trial on nonfederal grounds, there should be no trial at all. Petitioners should not be required to bear the burden of a costly and time-consuming trial occasioned by the Arizona Supreme Court's denial of petitioners' constitutional rights. Further, even if petitioners were to prevail at trial and make unnecessary further consideration of the constitutional question, there would remain in effect the unreviewed decision of the Supreme Court of Arizona that virtually all of Arizona's administrative agencies may commit all manner of procedural irregularities since their actions are reviewable by trial *de novo*. This Court's resolution of this issue will obviate the necessity of a trial and will restore order to the administrative process in Arizona.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Supreme Court of Arizona Has Relieved Virtually Every Arizona Administrative Agency from the Restraints Imposed by Fundamental Notions of Fairness and Due Process of Law

The opinion of the Supreme Court of Arizona has effectively obliterated the Administrative Procedure Act as applied to Arizona administrative agencies. The opinion grants *carte blanche* to the agencies to act upon mere whim in dealing with members of the public who appear before them. No longer are Arizona's administrative agencies required to observe any semblance of rational conduct. The Arizona Supreme Court has concluded that where an agency decision is subject to *de novo* review, any errors which the agency might have made are *"wholly irrelevant"*.

Ariz. Rev. Stat. Ann. § 41-1011, a provision of the Arizona Administrative Procedure Act, provides that a final decision in a constested case before an administrative agency shall include findings of fact and conclusions of law. The trial court granted petitioners' motion for summary judgment on the grounds that no such findings were made by the Arizona Tax Commission. However, the Supreme Court of Arizona concluded that since the Arizona Legislature provided for a trial *de novo* on appeal from decisions of the Tax Commission, and virtually every other Arizona administrative agency [see statutes cited in Motion for Rehearing, A. 28a], "it must have considered that the errors, if any, which the [agency] made were wholly irrelevant . . . ."

If the opinion of the Supreme Court of Arizona is permitted to stand, there will be no sanctions of any kind to prevent Arizona's administrative agencies from conducting themselves irresponsibly, irrationally and with total disregard of the fundamental rights of Arizona citizens who appear before them. Arizona will be returned to the Dark Ages of the early part of this century when administrative agencies conducted themselves in Star Chamber fashion, conduct which prompted the widespread enactment of administrative procedure acts. The rules of rational conduct prescribed by such statutes, and founded in the due process requirements of the Fifth and Fourteenth Amendments, will henceforth be universal with the exception of the State of Arizona.

2. The Decision of the Supreme Court of Arizona Eliminating the Requirement of Findings of Fact and Conclusions of Law by the Arizona State Tax Commission is Repugnant to the Due Process Clause of the Fourteenth Amendment

The decision of the Supreme Court of Arizona is in direct conflict with previous rulings of this Court that findings of fact by administrative agencies are required as a matter of constitutional law. In *Panama Refining Company v. Ryan*, 293 U.S. 388 (1934), this Court held that if a citizen is to be required to comply with an order of an executive officer, board or commission, "*due process of law* requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determination of fact, those determinations must be shown." 293 U.S. at 432 (emphasis added).

In *Wichita Railroad & Light Company v. Public Utilities Commission of the State of Kansas*, 260 U.S. 48, 59 (1922), this Court based the requirement of findings on "general principles of constitutional government," and invalidated an order lacking such findings despite the absence of any statutory requirement that findings be made. This principle was reiterated in *Mahler v. Eby*, 264 U.S. 32 (1924).

Although the constitutional basis for the requirement of findings is not often raised because of the pervasiveness of the statutory requirement, several more recent state court decisions have discussed the issue. In *Swars v. Council of City of Vallejo*, 33 Cal.2d 867, 870, 206 P.2d 355, 358 (1949), the court recognized that the findings requirement may rest upon a statutory requirement or upon "constitutional grounds". In *A. DiCillo & Sons v. Chester Zoning Board of Appeals*, 44 Ohio St. 2d 44, 48, 98 N.E.2d 352,

356 (1950), the Court stated: "Now well established principles of due process require administrative agencies to amplify their decisions with findings of fact and legal conclusions . . . ." *See also, e.g., New England Tel. & Tel. Co. v. Kennelly*, 81 R.I. 1, 98 A.2d 835 (1953); *Laney v. Holbrook*, 150 Fla. 622, 8 So.2d 465 (1942).

Therefore, even without the Arizona Administrative Procedure Act, an absence of findings by an administrative agency renders such agency's action constitutionally defective. The "cure" for such defect envisioned by the Arizona Supreme Court, a *de novo* judicial review, is a burden which cannot fairly be imposed upon the citizens of Arizona.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Arizona.

Respectfully submitted,

LESLIE T. JONES, JR.
DEAN C. SHORT, II
Evans, Kitchel & Jenckes, P.C.
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for Phelps Dodge
Corporation and ASARCO, Inc.

DAVID W. RICHTER
Bilby, Schoenhair, Warnock & Dolph
Ninth Floor, Valley National Bldg.
2 East Congress Street
Tucson, Arizona 85701
Attorneys for Duval Corporation

JAMES R. MALOTT, JR.
Morris & Malott
Post Office Box 351
Globe, Arizona 85501
Attorneys for Cities Service Company

G. HENRY LADENDORFF
Ladendorff & Ridge
34 West Monroe, Suite 500
Phoenix, Arizona 85003
Attorneys for Inspiration
Consolidated Copper Company

APPENDIX

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

In Banc

ARIZONA STATE TAX COMMISSION, et al., Appellants, v. PHELPS DODGE CORPORATION; DUVAL CORPORATION, et al., Appellees.	)	
STATE TAX COMMISSION OF ARIZONA, et al., Appellants, v. INSPIRATION CONSOLIDATED COPPER COMPANY, a corporation, Appellee.	)	No. 12998
STATE TAX COMMISSION OF ARIZONA, et al., Appellants, v. AMERICAN SMELTING AND REFINING COMPANY, a New Jersey corporation; and CITIES SERVICE COMPANY, a corporation, Appellees.	)	

[Filed July 21, 1977]

Appeals from the Superior Court of Maricopa County
Honorable Paul W. LaPrade, Judge

REVERSED WITH DIRECTIONS

Bruce E. Babbitt — Phoenix
The Attorney General
by James D. Winter
Assistant Attorney General
Robert O. Lesher
Special Assistant Attorney General
Attorneys for Appellants

Evans, Kitchel & Jenckes — Phoenix
by Leslie T. Jones, Jr.
Dean C. Short, II
Attorneys for Appellees
Phelps Dodge Corporation and
American Smelting & Refining Company

Bilby, Schoenhair, Warnock & Dolph — Tucson
by David W. Richter
Attorneys for Appellee
Duval Corporation

Ladendorff & Ridge — Phoenix
by G. Henry Ladendorff
Attorneys for Appellee
Inspiration Consolidated Copper Company

Morris & Malott — Globe
by James R. Malott, Jr.
Attorneys for Appellee
Cities Service Company

STRUCKMEYER, Vice Chief Justice

This is a consolidation of separate appeals perfected by the Arizona State Tax Commission against five mining companies. Jurisdiction was accepted on petition to transfer under Rule 47(e), Rules of the Supreme Court. Reversed.

The appellees initiated their actions in 1973 and 1974 in the Superior Court pursuant to A.R.S. § 43-177(f)(2),[1] following hearings on their protests to additional tax assessments. The Superior Court entered summary judgments on appellees' motions for the reason that the decisions of the Tax Commission were void for failure of the Commission to make findings of fact and conclusions of law as required by A.R.S. § 41-1011 of the Administrative Procedure Act.

A.R.S. § 43-177(e) and (f) provided the procedures to be pursued by taxpayers protesting proposals of additional tax. Section 43-177(f)(2) provides in part:

> "The superior court shall hear and determine the appeal as a trial de novo."

We said in Rojas v. Kimble, 89 Ariz. 276, 361 P. 2d 403 (1961):

> "We have repeatedly held that a trial de novo means a new trial 'as though it were one of original jurisdiction in the superior court.' [59 Ariz. 36, 122 P.2d 218]. Schnatzmeyer v. Industrial Commission, 78 Ariz. 112, 276 P.2d 534; Vazzano v. Superior Court, 74 Ariz. 369, 249 P.2d 837; Cox v. Superior Court, 73 Ariz. 93, 237 P.2d 820; Lane v. Ferguson, 62 Ariz. 184, 156

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[1] Section 43-177(f)(2) has been amended and replaced by A.R.S. § 43-177(g).

P.2d 236; Duncan v. Mack, 59 Ariz. 36, 122 P.2d 215; Manning v. Perry, 48 Ariz. 425, 62 P.2d 693." 89 Ariz. at 279, 361 P.2d at 405.

The power of the Superior Court under the statute § 43-177(f)(2) was limited to conducting a new hearing into the taxpayers' protests. It was not authorized and consequently did not have the jurisdiction to enter an order granting summary judgment and to remand to the Tax Commission for further consideration. Since the Legislature provided for a trial de novo, it must have considered that the errors, if any, which the Tax Commission made were wholly irrelevant to a determination in the Superior Court.

The Administrative Procedure Act, if it is in direct or inferential conflict with the specific legislative provision enacted to control tax appeals, has no application. Special statutes govern over general statutes.

> " 'In so far as the provisions of a special statute are inconsistent with those of a general statute on the same subject, the special statute will control. Knape v. Brown, 86 Ariz. 158, 342 P.2d 195 (1959); Whitfield Trans. Inc. v. Brooks, 81 Ariz. 136, 302 P.2d 526 (1956).'" State v. Marcus, 104 Ariz. 231, 234, 450 P.2d 689, 692 (1969), quoting from Desert Waters, Inc. v. Superior Court, 91 Ariz. 163, 370 P.2d 652 (1962).

One further matter has been raised which affects only the Phelps Dodge Corporation. The State urges that the Phelps Dodge Corporation has no legal standing to resist the assessment of additional taxes or to appeal from the ruling of the Tax Commission. What seemingly occurred is that the Phelps Dodge Corporation in 1966 requested permission of the Tax Commission to change from its traditional separate

accounting method to an apportionment method. Permission to make the change was denied. Nevertheless, Phelps Dodge changed its accounting method. This, it is asserted, is contrary to § 135-8(a) of the Rules of the Tax Commission. We express some doubt as to whether this is a question of standing rather than a defense on the merits to the protest by the Phelps Dodge Corporation of the assessment of additional taxes. But, irrespective, it is appropriate that the Superior Court in a trial de novo resolve this issue after a full and formal presentation by both sides to the controversy.

It is ordered that these causes are reversed with directions that the Superior Court proceed to a hearing on a trial de novo consistent with the views expressed herein.

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

CONCURRING:

JAMES DUKE CAMERON, Chief Justice

JACK D. H. HAYS, Justice

WILLIAM A. HOLOHAN, Justice

FRANK X. GORDON, JR., Justice

ARIZONA REVISED STATUTES

§ 41-1011. Decisions and orders

Unless otherwise provided by law, any final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Any final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. Unless otherwise provided by law, parties shall be notified either personally or by mail to their last known address of any decision or order. Upon request a copy of the decision or order shall be delivered or mailed forthwith to each party and to his attorney of record.

§ 43-177. Payments and assessments – deficiency statements

(f) *Appeal to superior court*

(2) The superior court shall hear and determine the appeal as a trial de novo. Within sixty days after the entry of judgment either party may appeal to the supreme court in the manner provided for appeals from the judgment of a superior court, and such appeal shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as other state cases.

DECISIONS OF THE STATE TAX COMMISSION OF ARIZONA

TO: STATE TAX COMMISSION OF ARIZONA
DATE: April 10, 1973
FROM: Robert L. Merrill, Director, Income Tax Division

SUBJECT: Protest of additional Arizona State Corporation Income Tax assessed Phelps Dodge, 300 Park Avenue, New York, New York, 10022, for the calendar year 1966, in the amount of $2,413,411.37; for the calendar year 1967, in the amount of $1,664,535.07; for the calendar year 1968, in the amount of $2,130,668.30, for a total of $6,208,614.74, plus interest to date of payment.

HISTORY: The taxpayer requested permission to change from the Separate Accounting Method of reporting, to the Apportionment Method, in filing their 1966 Arizona State Corporation Income Tax return. The Arizona State Tax Commission denied the taxpayer's request to change their reporting method August 27, 1967; however, the taxpayer in computing their 1966, and subsequent income tax returns, computed their tax under Apportionment Method. The Income Tax Division notified the taxpayer that we would accept their 1966 return, but we would not agree with their method of reporting. The taxpayer continued to report on the Apportionment Method for the 1967 and 1968 returns. Each time the taxpayer was notified of the Tax Commission's position.

Under date of January 6, 1972, the Income Tax Division issued proposed assessments to above-named taxpayer. The principle adjustment for

all years, consisted of 1. changing the taxpayers method of reporting from Apportionment Method, back to Separate Accounting Method, 2. Recomputation of the depletion claimed by taxpayer:

(a) applied the 50% limitation on percentage depletion computation.

(b) changed the depletion basis of certain properties back to the Unit Method for purposes of computing depletion.

Taxpayer timely protested the assessments March 31, 1972. An oral hearing was held by Tax Commission October 20, 1972, at which time the matter was taken under advisement. The Tax Commission instructed the Income Tax Divison to reaudit certain portions of the taxpayers records. This audit commenced October 31, 1972. The results of this audit further substantiated the Income Tax Division's position that the Separate Accounting Method of reporting was proper prior to 1966, and would still more clearly reflect the taxpayers business activity with Arizona. Separate accounting records are maintained both in Arizona and in New York. These records show that it is the taxpayers practice to maintain exacting separate accounting on their entire Arizona operation, separate and apart from their other operations.

OPINION & RECOMMENDATION:

It is the opinion of the writer that Separate Accounting Method of reporting more clearly reflects the true picture of the taxpayers activities within the State of Arizona.

It is, therefore, recommended that taxpayer's protest be denied and taxpayers be notified of this action.

/s/ Robert L. Merrill
Director, Income Tax Division

RECOMMENDATION APPROVED: RECOMMENDATION DENIED:

/s/ John M. Hazelett

/s/ Waldo DeWitt

/s/ Bob Kennedy

TO: State Tax Commission of Arizona
DATE: May 24, 1974
FROM: Robert L. Merrill, Director, Income Tax Division

SUBJECT: Protest of proposed assessment of additional Arizona State Corporation Income Tax assessed American Smelting and Refining Company, 120 Broadway, New York, New York 10005, for the calendar years 1966, 1967 and 1968, in the amounts of $302,744.98, $286,014.01 and $580,360.15, for a total of $1,169,119.14, plus interest to date of payment.

HISTORY: Under date of January 6, 1972, the Income Tax Division issued notice of proposed assessment of additional Arizona State Corporation income tax to above-named taxpayer. The principal adjustment in all years was to change the method of reporting for Arizona income tax purposes from the apportionment method to separate accounting method. These adjustments

were made subsequent to a detailed audit of the taxpayer's records which disclosed that separate accounting method more clearly reflects the income from the taxpayer's operations within the State of Arizona pursuant to the authority under Section 43-135(g) and 43-121 (a), Arizona Revised Statutes.

The taxpayer timely protested the proposed assessment which was received in the Income Tax Division May 31, 1972, requesting an oral hearing.

Said hearing was held October 27, 1972, at which time the Commission took the matter under advisement.

OPINION & RECOMMENDATION:

It is the opinion of the writer that the assessment as issued is proper and does more clearly reflect the revenue derived from the taxpayer's operations within the State of Arizona under all provisions of the Arizona Income Tax Code, in addition it is clearly within the discretionary authority available to the Commission under the law to require separate accounting method in such cases.

It is therefore recommended that the taxpayer's protest be denied and the taxpayer, and their legal counsel, Leslie T. Jones, Jr., of the law firm Evans, Kitchel & Jenckes, 363 North First Avenue, Phoenix, Arizona 85003, be notified of this action.

/s/ Robert L. Merrill
ROBERT L. MERRILL,
Director
Income Tax Division

RECOMMENDATION APPROVED: RECOMMENDATION DENIED:

/s/ John M. Hazelett

/s/ Waldo DeWitt

/s/ Bob Kennedy

TO: STATE TAX COMMISSION OF ARIZONA
DATE: June 7, 1973
FROM: Robert L. Merrill, Director, Income Tax Division

SUBJECT: Protest of proposed assessment of Arizona State Corporation Income Tax assessed City Services Company (formerly Tennessee Corporation) 60 Wall Street, New York, New York 10005, for the calendar years:

1965, in the amount of $39,288.94

1966, in the amount of $79,608.94

1967, in the amount of $ 9,521.78

1968, in the amount of $60,658.13

for a total of $189,077.79, plus interest to date of payment.

HISTORY: Under the following dates the Income Tax Division issued notices of proposed assessments of additional taxes to the above-named taxpayer:

Under date of August 6, 1970, for the calendar year 1965, in the amount of $39,288.94.
Under date of July 8, 1971, for the calendar year 1966, in the amount of $79,608.94.
Under date of January 6, 1972, for the calendar year 1967, in the amount of $9,521.78.
Under date of January 6, 1972, for the calendar year 1968, in the amount of $60,658.13.

for a total of $189,077.79.

The principal adjustment in all years was to change the taxpayers method of reporting income for Arizona income tax purposes from

the apportionment method to the separate accounting method, pursuant to the authority granted under Section 43-131(a), and 43-135 (g), Arizona Revised Statutes.

The taxpayer timely filed a protest to the proposed assessments and requested an oral hearing. On October 25, 1972 this hearing was held in the office of the Arizona State Tax Commission. Present at the hearing was Mr. Morris Blumberg, Tax Dept., Tennessee Corporation, Mr. James R. Malott, Legal Counsel and Mr. Robert J. Baron, Tax Specialist. Mr. James R. Malott presented oral argument to the effect that the taxpayer's business was entirely unitary in nature and therefore an apportionment method of reporting should be used.

OPINION & RECOMMENDATION:

It is the opinion of the writer that the taxpayer's records are such that the corporate accounting procedures established by the taxpayer can easily reflect the income earned by the taxpayer's operations within the State of Arizona, and that the separate accounting method clearly reflects the income earned by taxpayer in Arizona.

It is, therefore, recommended that the taxpayer's portest be denied and taxpayer notified of this action, a copy being sent to James R. Malott, Attorney at Law, P. O. Box 351, Globe, Arizona 85501.

/s/ Robert L. Merrill
Director, Income Tax Division

RECOMMENDATION APPROVED:

/s/ John M. Hazelett

/s/ Bob Kennedy

RECOMMENDATION DENIED:

TO: State Tax Commission of Arizona
DATE: May 28, 1974
FROM: Robert L. Merrill, Director, Income Tax Division

SUBJECT: Protest of assessment of Arizona State Corporation Income Tax by Inspiration Consolidated Copper Company, 25 Broadway, New York, New York 10004, for the calendar years 1963, in the amount of $14,015.05; for the calendar year 1964, in the amount of $7,244.71; for the calendar year 1965, in the amount of $15,989.65; for the calendar year 1966, in the amount of $19,741.11, for a total of $56,990.52, plus interest to date of payment.

HISTORY: Under date of April 26, 1968, Income Tax Division issued notice of assessment to above-named taxpayer. The principle adjustment in all years was to change the method of reporting from the apportionment Method to separate accounting method.

Taxpayer timely protested the proposed assessments and requested an oral hearing. Said hearing was held before the Commission March 27, 1969, at which time the Commission took the matter under advisement.

OPINION & RECOMMENDATION:

It is the opinion of the writer that the separate accounting method more clearly reflects the revenue attributable to sources within the State of Arizona, also the Tax Commission is

within discretionary authority to make the determination as to the method of accounting which in their opinion more clearly reflects revenue derived from operations within the State of Arizona. It is therefore recommended the taxpayer's protest be denied and taxpayer be notified of this action.

/s/ Robert L. Merrill
Director, Income Tax Division

RECOMMENDATION APPROVED:

/s/ John M. Hazelett

/s/ Waldo DeWitt

RECOMMENDATION DENIED:

TO: STATE TAX COMMISSION OF ARIZONA
DATE: May 15, 1973
FROM: Robert L. Merrill, Director, Income Tax Division

SUBJECT: The protest of additional Arizona State Corporation Income Tax assessed Duval Corporation, 1906 First City National Bank Building, Houston, Texas, 77002, for the calendar year 1964, operating loss adjustment, calendar year 1965, additional tax due in amount of $62,072.41, for the calendar year 1966, additional tax due in amount of $388,011.61, for the calendar year 1967, additional tax due $580,790.30, all plus interest to date of payment.

HISTORY: Under date of May 14, 1969, the Income Tax Division issued notice of proposed correction of Arizona State Corporation Income Tax to the above-named taxpayer. The principle adjustment consists of changing the taxpayers method of reporting from Apportionment method to Separate Accounting method.

Under date of November 10, 1969, taxpayer protested the proposed assessment. February 4, 1970, a hearing before the Arizona State Tax Commission was held. At the hearing the taxpayer's legal counsel, Mr. David W. Richter, presented oral argument to the effect that the operations of Duval were unitary in nature, and therefore the appointment method of reporting would be more proper. Taxpayer cited the Butler Brothers case and the Superior Oil case, both California cases pertaining to Apportionment v Separate Accounting method of reporting.

OPINION & RECOMMENDATION:

It is the opinion of the writer that there are also numerous cases which would support the Tax Commission's position that separate accounting more clearly reflects income earned in Arizona. The taxpayer operates copper mines in Arizona near Tucson and Kingman, and over one-half of their copper mined in Arizona is sold in Arizona to A S & R at their Hayden plant. The taxpayer also maintained detailed cost accounting records showing the exact cost of its Arizona operations.

Pursuant to Section 43-135(g), Arizona Revised Statutes, the Tax Commission is within its authority to select the method of reporting which would more accurately reflect income earned in the State of Arizona.

It is therefore recommended that the taxpayer's protest be denied and the taxpayer notified of this action, sending copies to their accountant, J. Carl Dornan, CPA, Arthur Anderson & Co., 34 West Monroe, Phoenix, Arizona 85003, and to their attorney, David W. Richter, Bilby, Thompson, Shoenhair & Warnock, 9th Floor, Valley Bank Building, Tucson, Arizona 85701.

/s/ Robert L. Merrill
Director, Income Tax Division

RECOMMENDATION APPROVED:

/s/ John M. Hazelett

/s/ Waldo DeWitt

/s/ Bob Kennedy

RECOMMENDATION DENIED:

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

PHELPS DODGE CORPORATION, et al.,
Plaintiffs,
vs.
STATE TAX COMMISSION, et al.,
Defendants.

No. C-276702
JUDGMENT

FILED: December 31, 1975

This matter having come on for hearing on Plaintiffs' Motion for Summary Judgment and the Court having considered said motion, and being duly advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiffs are entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Arizona State Tax Commission finding plaintiffs to be obligated for additional income taxes and interest thereon, for the years 1966, 1967 and 1968 is void;

AND IT IS FURTHER ORDERED that plaintiffs are awarded such costs as are appropriate herein.

DONE IN OPEN COURT this 31st day of December, 1975.

/s/ Paul W. LaPrade
Judge of the Superior Court

Approved as to form:

Robert O. Lesher, Esq.
Lesher, Kimble, Rucker & Lindamood, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorneys for Defendants

/s/ Robert O. Lesher
Robert O. Lesher

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

AMERICAN SMELTING AND REFINING COMPANY, a New Jersey corporation, Plaintiff, vs. ARIZONA STATE TAX COMMISSION, et al., Defendants.	No. C-294451 JUDGMENT

FILED: December 30, 1975

This matter having come on for hearing on plaintiff's Motion for Summary Judgment and the Court having considered said motion, and being duly advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Arizona State Tax Commission finding plaintiff to be obligated for additional income taxes and interest thereon, for the years 1966, 1967 and 1968 is void;

AND IT IS FURTHER ORDERED that plaintiff is awarded such costs as are appropriate herein.

DONE IN OPEN COURT this 30 day of December, 1975.

/s/ Paul W. LaPrade
Judge of the Superior Court

Approved as to form:

Robert O. Lesher, Esq.
Lesher, Kimble, Rucker & Lindamood, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorneys for Defendants

/s/ Robert O. Lesher
Robert O. Lesher

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

DUVAL CORPORATION, Plaintiff, vs. ARIZONA STATE TAX COMMISSION, et al., Defendants.	No. C-276702 (Consolidated) Pima County No. 143191 JUDGMENT

FILED: January 8, 1976

This matter having come on for hearing on plaintiff's Motion for Summary Judgment and the Court having considered said motion, and being duly advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Arizona State Tax Commission finding plaintiff to be obligated for additional income taxes and interest thereon, for the years 1964, 1965, 1966, and 1967 is void;

AND IT IS FURTHER ORDERED that plaintiff is awarded such costs as are appropriate herein.

DONE IN OPEN COURT this 7th day of January, 1976.

/s/ Paul W. LaPrade
Judge of the Superior Court

Approved as to form:

Robert O. Lesher, Esq.
Lesher, Kimble, Rucker & Lindamood, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorneys for Defendants

/s/ Robert O. Lesher
Robert O. Lesher

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CITIES SERVICE COMPANY, a corporation, Plaintiff, vs. THE STATE TAX COMMISSION, OF ARIZONA, et al., Defendants.	No. C-294451 (Consolidated) Gila County No. 17,520-B JUDGMENT

FILED: December 31, 1975

This matter having come on for hearing on Plaintiff's Motion for Summary Judgment and the Court having considered said motion, and being duly advised in the premises, the Court finds that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Arizona State Tax Commission finding Plaintiff to be obligated for additional income taxes and interest thereon, for the years 1965, 1966, 1967 and 1968 is void;

AND IT IS FURTHER ORDERED that Plaintiff is awarded such costs as are appropriate herein.

DONE IN OPEN COURT this 31st day of December, 1975.

/s/ Paul W. LaPrade
Judge of the Superior Court

Approved as to form:

Robert O. Lesher, Esq.
Lesher, Kimble, Rucker & Lindamood, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorneys for Defendants

/s/ Robert O. Lesher
Robert O. Lesher

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

INSPIRATION CONSOLIDATED COPPER COMPANY, a corporation, Plaintiff, vs. STATE TAX COMMISSION, et al., Defendants.	No. C-295102 JUDGMENT

FILED: January 12, 1976

This matter having come on for hearing on plaintiff's Motion for Summary Judgment and the Court having considered said motion, and being duly advised in the premises, the Court finds that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the decision of the Arizona State Tax Commission finding plaintiff to be obligated for additional income taxes and interest thereon, for the years 1963, 1964, 1965, and 1966, is void;

AND IT IS FURTHER ORDERED that plaintiff is awarded such costs as are appropriate herein.

DONE IN OPEN COURT this 12 day of January, 1976.

/s/ Paul W. LaPrade
Judge of the Superior Court

Approved as to form:

Robert O. Lesher, Esq.
Lesher, Kimble, Rucker & Lindamood, P.C.
3773 East Broadway
Tucson, Arizona 85716
Attorneys for Defendants

/s/ Robert O. Lesher
Robert O. Lesher

EXCERPT FROM APPELLANT'S OPENING BRIEF

At Page 9:

> *"It is clear that the Administrative Procedure Act applied to the Tax Commission as it then existed.* (Emphasis added.) The question is therefore this: Did A.R.S. §41-1011 require that the Commission make specific Findings and Conclusions *in these cases?"*

IN THE SUPREME COURT
STATE OF ARIZONA

ARIZONA STATE TAX COMMISSION, et al., Appellants, vs. PHELPS DODGE CORPORATION, et al., Appellees.	No. 12998 MOTION FOR REHEARING

Appellees PHELPS DODGE CORPORATION AND RELATED CORPORATIONS and ASARCO, INCORPORATED hereby file this Motion for Rehearing, pursuant to 17A A.R.S. Sup. Ct. Rules, Rule 9(a).

This Motion is supported by all matters of record and by the following Memorandum of Points and Authorities.

DATED this 5th day of August, 1977.

EVANS, KITCHEL & JENCKES, P.C.

By /s/ Dean C. Short
Leslie T. Jones, Jr.
Dean C. Short, II
Attorneys for Appellees
Phelps Dodge Corporation
and ASARCO, Incorporated

MEMORANDUM OF POINTS AND AUTHORITIES

> "Proper grounds for a motion for rehearing include a showing that . . . there was a clear mistake of law, as where the original opinion overlooks some precedent from this Court, or where the Court apparently failed to realize the full effect of the ruling it had handed down." Bernstein, *The Disposition of Civil Appeals in the Supreme Court*, 5 Ariz. L. Rev. 175, 189 (1964).

This Court's original opinion* in this matter involves both of the mistakes of law characterized by former Chief Justice Bernstein as proper grounds for a rehearing of the matter.

First, the decision that the Administrative Procedure Act does not control the conduct of the Arizona Tax Commis-

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*Incidentally, the opinion misconstrued the record in stating that the lower court remanded the proceedings back to the Tax Commission when its decisions were found to be void. This did not occur. No remand was made, as it would have been improper for the various reasons Appellees have previously urged.

sion in dealing with members of the public overrules long-standing precedent to the contrary. *See, e.g., State Tax Commission v. Wallapai Brick & Clay Products, Inc.*, 85 Ariz. 23, 330 P.2d 988 (1959). Further, this reversal is accomplished with no discussion whatsoever of the existing precedent and is contrary to the arguments advanced by *both* Appellants and Appellees. Appellants conceded the applicability of the Act in their Opening Brief at page 9:

> "It is clear that the Administrative Procedure Act applied to the Tax Commission as it then existed."

Secondly, this Court's reversal of its long-standing position on the applicability of the Administrative Procedure Act to the State Tax Commission (now State Board of Tax Appeals) has also effectively obliterated the Act with respect to most of Arizona's other administrative agencies as well. This Court's holding that an administrative agency need not comply with the Administrative Procedure Act where the agency's decision is reviewable by trial de novo in the Superior Court means that the Act is no longer applicable to any of the following agencies, each of which (like the Tax Commission) is governed by a special statute providing for de novo review:

Agency	*Ariz. Rev. Stat.*
Superintendent of Banks	§6-833
State Chemist	§3-279
Department of Insurance	§28-1122
State Land Commissioner	§§37-134, 37-214
Land Commissioner, Board of Appeals	§37-214
Livestock Sanitary Board	§§24-106, 24-396, 24-621.15
Motor Vehicle Division, Assistant Director	§28-1323(E)

State Board of Dispensing Opticians	§32-1695
State Board of Optometry	§32-1756
Arizona State Board of Parks	§41-511.08
Board of Pesticide Control	§3-386(c)
Secretary of State	§32-1054
Director of Department of Transportation	§32-2391

What then governs the conduct of each of these agencies in dealing with members of the public? If the Court's decision is permitted to stand – Nothing. Surely this cannot be the consequence that was anticipated by this Court in concluding that the Tax Commission need not make findings of fact.

Additionally, the following agencies are subject to the Arizona Administrative Review Act, A.R.S. §12-901 *et seq.*, either pursuant to a specific statutory review provision or because they have no special provision for judicial review. A.R.S. §12-902. In either case, where the agency proceedings were not stenographically recorded, review of the agency decision is by trial de novo in the Superior Court if requested by either party. A.R.S. §12-910(B). Accordingly, this Court's decision in this matter makes the Administrative Procedure Act inapplicable to these agencies where there is no stenographically recorded hearing. In other words, if the following agencies choose not to record their proceedings, they need not follow any rules.

Administrative Agencies Expressly
Subject to the Administrative Review Act

Agency	*Ariz. Rev. Stat.*
State Board of Accountancy	§32-743(J)
State Air Pollution Control Hearing Board	§36-1713.01(A)

Arizona Atomic Energy Commission	§30-686(C)
Hearing Board of State Banking Department	§6-366
State Superintendent of Banks	§§6-867, 6-909(B)
Director of Building Codes Division within the Office of Registrar of Contractors	§44-1708(E)
Corporation Commission	§41-1844(B)
State Board of Cosmetology	§32-554
Director of Department of Economic Security	§23-724(D), §41-1993
Director of the Department of Health Services	§§36-113, 36-432, 36-477(A), 36-536(C), 36-796.06, 36-1935(B)
State Land Department	§45-191
Oil and Gas Conservation Commission	§27-520(A)
State Board of Private Technical and Business Schools	§15-944
State Board of Psychologist Examiners	§32-2082(C)
Arizona Racing Commission	§5-108.0.(B)
State Real Estate Commissioner	§32-2159(A)
Water Quality Control Council	§36-1868(A), 36-1870(B), 36-1870(C)
State Weights and Measures Division of the Department of Administration	§41-2112(E)

Administrative Agencies Without Special Review Provisions

Agency	*Ariz. Rev. Stat.*
State Board of Chiropractic Examiners	§32-901 *et seq.*
Civil Rights Division of the Department of Law; Arizona Civil Rights Advisory Board	§41-1401 *et seq.*
Arizona Coliseum and Exposition Center Board	§3-1001 *et seq.*
State Board of Directors for Community Colleges	§15-651 *et seq.*
Director of the State Department of Corrections	§41-1601 *et seq.*
State Dairy Commissioner	§3-601 *et seq.*
State Board of Dental Examiners	§32-1201 *et seq.*
State Egg Inspection Board	§3-701 *et seq.*
Arizona Game and Fish Department	§17-201 *et seq.*
Arizona Law Enforcement Officer Advisory Council	§41-1821 *et seq.*
Board of Library Examiners	§11-906
Joint Board of Medical Examiners and Osteopathic Examiners in Medicine and Surgery	§32-2501
Board of Examiners of Nursing Care Institution Administrators	§36-446 *et seq.*
Arizona State Board of Pharmacy	§32-1901 *et seq.*
Board of Physical Therapy Examiners	§32-2001 *et seq.*
State Board of Podiatry Examiners	§32-801 *et seq.*
Director of the Department of Public Safety	§32-2401 *et seq.*
	§32-2601 *et seq.*
Decisions of the Director of the Department of Health Services under Pure Food Control Act	§36-901 *et seq.*

Arizona Board of Regents	§15-721 *et seq.*
State Retirement System Board	§38-741 *et seq.*
Structural Pest Control Board	§32-2301 *et seq.*
State Board of Technical Registration	§32-101 *et seq.*
Arizona State Veterinary Medical Examining	§32-2201 *et seq.*

Again, it is inconceivable that all these administrative agencies are now to be excepted from compliance with the Administrative Procedure Act in their dealings with the public. This clearly cannot have been the intent of the legislature in enacting the Administrative Procedure Act and this cannot have been the intent of this Court.

In precluding application of the Administrative Procedure Act to all the above state agencies where review is by trial de novo, this Court has effectively overruled two recent Arizona Court of Appeals decisions, *Brown v. Superior Court*, 22 Ariz. App. 72, 523 P.2d 799 (1974), and *Didlo v. Talley*, 21 Ariz. App. 446, 520 P.2d 540 (1974), both applying the Administrative Procedure Act to agencies whose decisions are reviewable de novo. In fact, the Court in *Brown* specifically directed the Superior Court (reviewing the agency decision de novo) to inquire into whether the Administrative Procedure Act had been complied with by the Motor Vehicle Division. Although these decisions are in direct conflict with the decision of this Court, the opinion ignores them entirely.

Finally, this Court's construction of A.R.S. §43-177(f)(2) providing for de novo review of decisions of the Tax Commission (now Board of Tax Appeals) so as to preclude application of the Administrative Procedure Act, and thus eliminating the requirement of findings of fact and conclusions of law, is contrary to the requirements of due process of law embodied in the United States Constitution. Accordingly, the statute as applied by this Court is *invalid*

by reason of repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Although the Constitutional deficiency in the Tax Commission proceedings was raised in Appellees' Complaints and has been implicit in Appellees' extensive discussion of the rationale for the Administrative Procedure Act, Appellees had no reason to focus directly on such Constitutional defect prior to the wholly unanticipated decision of this Court. Appellees relied on the clear mandate of the state statute requiring findings by the Tax Commission and could not reasonably foresee a reversal of this Court's long-standing position on the applicability of the Administrative Procedure Act, especially since all the parties involved conceded its applicability.

In any event, this Court's decision now presents a direct conflict with numerous rulings of the United States Supreme Court to the effect that findings of fact by administrative agencies are required as a matter of due process of law. In *Panama Refining Company v. Ryan*, 293 U.S. 388 (1934), the Supreme Court held that if a citizen is to be required to comply with an order of an executive officer, board or commission,

> "*due process of law* requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown." 293 U.S. at 432 [emphasis added].

In *Wichita Railroad & Light Company v. Public Utilities Commission of the State of Kansas*, 260 U.S. 48, 59 (1922), the Court based the requirement of findings on "general principles of constitutional government," and invalidated an order lacking such findings despite the absence of any

statutory requirement that the order contain findings. This principle was reiterated in *Mahler v. Eby*, 264 U.S. 32 (1924).

Although the constitutional basis for the requirement of findings is not often raised because of the pervasiveness of the statutory requirement, several more recent state court decisions have discussed the issue. In *Swars v. Council of City of Vallejo*, 33 Cal.2d 867, 870, 206 P.2d 355, 358 (1949), the court recognized that the findings requirement may rest upon a statutory requirement or upon "constitutional grounds." In *A. DiCillo & Sons v. Chester Zoning Board of Appeals*, 98 N.E.2d 352, 356 (Ohio 1950), the Court stated:

> "Now well established principles of due process require administrative agencies to amplify their decisions with findings of fact and legal conclusions. . . ."

See also, e.g., New England Tel. & Tel. Co. v. Kennelly, 81 R.I. 1, 98 A.2d 835 (1953); *Laney v. Holbrock*, 150 Fla. 622, 8 So.2d 465 (1942).

Thus, even if the requirements of the Administrative Procedure Act are not applicable to an agency decision reviewable by trial de novo, the fundamental constitutional right to due process of law requires that findings be made. Accordingly, the decision of this Court is necessarily in direct conflict with the above-referenced state and U.S. Supreme Court rulings that findings are indeed a requirement of due process, or this Court's decision must be construed to eliminate the requirement of due process at the administrative level where the agency decision is reviewable de novo. Such construction does seem consistent with the Court's statement that any *errors* made by the agency are

irrelevant where de novo review is available, since "errors" could encompass a multitude of irregularities vitiating even the most fundamental notions of fairness and due process. However the original opinion of this Court is construed, it is inescapably permeated with constitutional infirmities.

For these reasons, this Court is respectfully requested to rehear this matter and reconsider its original decision herein.

Respectfully submitted,

EVANS, KITCHEL & JENCKES, P.C.

By /s/ Dean C. Short
Leslie T. Jones, Jr.
Dean C. Short, II
Attorneys for Appellees
Phelps Dodge Corporation
and ASARCO, Incorporated

EXPLANATORY NOTE

The Memorandum of Points and Authorities set forth above was adopted by all petitioners and was incorporated by reference in the various Motions for Rehearing filed by Inspiration Consolidated Copper Company, Duval Corporation and Cities Service Company.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

ARIZONA STATE TAX COMMISSION, et al., Appellants, vs. PHELPS DODGE CORPORATION; DUVAL CORPORATION, et al., Appellees.	September 12, 1977 Supreme Court No. 12998 Court of Appeals Nos. 1 CA-CIV 3416 1 CA-CIV 3387 1 CA-CIV 3388
STATE TAX COMMISSION OF ARIZONA, et al., Appellants, vs. INSPIRATION CONSOLIDATED COPPER COMPANY, a corporation, Appellee.	Maricopa County Nos. 276702, 295102, and 294451 Pima County No. 143191
STATE TAX COMMISSION OF ARIZONA, et al., Appellants, vs. AMERICAN SMELTING AND REFINING COMPANY, a New Jersey corporation; and CITIES SERVICE COMPANY, a corporation, Appellees.	

The following action was taken by the Supreme Court of the State of Arizona on September 8, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing (Duval) = DENIED.
FURTHER ORDERED: Motions for Rehearing (Phelps Dodge, ASARCO, Cities Service, Inspiration Consolidated) = DENIED."

Mandate enclosed herewith.

CLIFFORD H. WARD, Clerk

By /s/ Mary Ann Hopkins
Chief Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 State Capitol Building, Phoenix Arizona 85007 Attn: James D. Winter
Leslie T. Jones, Jr., Esq. and Dean C. Short, II, Esq., Evans, Kitchel & Jenckes, 363 North First Avenue, Phoenix, Arizona 85003
David W. Richter, Esq., Bilby, Shoenhair, Warnock & Dolph, 9th Floor, Valley National Building, 2 E. Congress Street, Tucson, Arizona 85701
G. H. Ladendorff, Esq., Ladendorff & Ridge, 34 West Monroe Street, Suite 500, Phoenix, Arizona 85003
James R. Malott, Jr., Esq., Morris & Malott, P. O. Box 351, Globe, Arizona 85501
Hon. Paul W. LaPrade, Judge, Maricopa County Superior Court, 101 West Jefferson Street, Phoenix, Arizona 85003

Supreme Court, U. S.
FILED
JAN 4 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-811

PHELPS DODGE CORPORATION and related corporations; AMERICAN SMELTING AND REFINING COMPANY (ASARCO, INCORPORATED); DUVAL CORPORATION; CITIES SERVICE COMPANY; and INSPIRATION CONSOLIDATED COPPER COMPANY,

Petitioners,

v.

THE STATE TAX COMMISSION OF ARIZONA; JOHN M. HAZELETT, L. WALDO DEWITT and BOB KENNEDY, COMMISSIONERS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

BRUCE E. BABBITT
Attorney General

JAMES D. WINTER
Assistant Attorney General
338 State Capitol
Phoenix, Arizona 85007

Attorneys for Respondents.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-811

PHELPS DODGE CORPORATION and related corporations; AMERICAN SMELTING AND REFINING COMPANY (ASARCO, INCORPORATED); DUVAL CORPORATION; CITIES SERVICE COMPANY; and INSPIRATION CONSOLIDATED COPPER COMPANY,

Petitioners,

vs.

THE STATE TAX COMMISSION OF ARIZONA; JOHN M. HAZELETT, L. WALDO DEWITT and BOB KENNEDY, COMMISSIONERS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Our only objection to this section of the Petition for Writ of Certiorari is that the provisions of A.R.S. § 43-177 should have been more completely stated

and that A.R.S. § 12-911 should be included. Accordingly, A.R.S. § 43-177(c), (e) and(f) and A.R.S. § 12-911 are set forth in the Appendix at pages 16 and 17.

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require a state administrative agency to make findings of fact and conclusions of law in respect to a hearing on the assessment of a proposed tax deficiency where the taxpayer's statutory appeal remedy is a trial de novo?

STATEMENT OF THE CASE

The Arizona State Tax Commission proposed to assess deficiency income tax assessments on petitioners herein for the years 1966 through 1968. These deficiency assessments were based on the position that petitioners should

have calculated their Arizona source income for purposes of Arizona state income tax on the separate accounting basis provided for in A.R.S. § 43-135(g) as opposed to the apportionment formula used by all petitioners. Protests to the proposed assessment were filed by each petitioner and oral hearings were duly held in accordance with A.R.S. § 43-177. The Tax Commission decided the protests adversely to the petitioners and thereafter the petitioners appealed to the Arizona Superior Court.

The cases were consolidated in the Superior Court. Motions for summary judgment were then filed by the petitioners. The petitioners moved for summary judgment on the grounds that the Tax Commission decisions were void due to the failure of the Tax Commission to

make written findings of fact and conclusions of law in compliance with the Arizona Administrative Procedure Act, A.R.S. § 41-1011. The State contended that the Administrative Procedure Act which was applicable to the Tax Commission did not generally apply in this case because a special statute, A.R.S. § 43-177 establishing a different procedure for this type of case was applicable under the "Unless otherwise provided by law" phrase of A.R.S. §41-1011. The petitioners' motions for summary judgment were granted and the respondents herein appealed directly to the Arizona Supreme Court.

The Arizona Supreme Court reversed the decision of the lower court and remanded the consolidated action with directions that the Superior Court

proceed to a hearing on a trial de novo. The Arizona Supreme Court held that if there was a conflict between the Administrative Procedure Act and A.R.S. §43-177(f), then the special statute, A.R.S. § 43-177(f) would prevail over the general statute, A.R.S. § 41-1011 of the Administrative Procedure Act. After denial of petitioners' motion for rehearing by the Arizona Supreme Court the petitioners filed this Petition for a Writ of Certiorari.

ARGUMENT

I. Jurisdictional Questions.

A federal question not presented prior to decision by the court of last resort of the state comes too late Ex parte Spies, 123 U.S. 131 (1887). While petitioners acknowledge on page 4 of their Petition for Writ of Certiorari

that the general rule is that a constitutional question first raised on motion for rehearing in a state appellate court comes too late to serve as a basis for review by the Supreme Court of the United States, the petitioners' claim to come within the exception applicable to those cases where the decision supplies a new or unexpected base for a claim of denial of a constitutional right.

Since the respondents did not concede that the Administrative Procedure Act was specifically applicable as petitioners' claimed on page 3 of their Petition, but on the contrary took the position that the Administrative Procedure Act by its own terms excluded its general application to this situation (Appellants' Opening Brief at pages 9 and 10, Appendix, page 19), the petitioners should have anticipated

the possibility that this state question could have been decided adversely to them. If the petitioners intended to preserve their right to argue the constitutional issue, they should have argued that issue below. The decision does not supply a new or unexpected basis for a claim of denial of a constitutional right within the meaning of Great Northern R.R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932), where the grounds of the state court decision supplied the defeated party with the new basis for claiming denial of a constitutional right.

The Arizona Supreme Court reversed the Superior Court decision with directions that the Superior Court proceed to a hearing on a trial de novo. Under the provisions of 28 U.S.C. §1257, the United

States Supreme Court may review final judgments of the highest court of the state. The petitioners argue that this is a final judgment on the basis of Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975).

Petitioners do not fall within the Cox Broadcasting exception to the rule of finality. Cox Broadcasting is distinguishable from this case because the reversal of the state court on the federal issue in that case was preclusive of further litigation. In this case reversal of the state court on the federal issue would not be preclusive of further litigation.

If A.R.S. § 43-177 was unconstitutional and the Administrative Procedure Act was generally applicable, then the Judicial Review of Administrative

Decisions Act would also be applicable and superior courts have broad powers under A.R.S. § 12-911 (Appendix, p.16) in such cases. Those powers include the power to "specify questions or matters requiring further hearing or proceedings and give other proper instructions." Courts have remanded cases to administrative agencies for the purpose of making findings of fact and conclusions of law. Trustees of Lexington Realty Trust v. City of Concord, N.H., 336 A.2d 591 (1975); Meadowbrook Country Club v. State Tax Commission of Missouri, 538 S.W.2d 310 (1976). The Missouri statute, Revised Statutes of Missouri 1969 § 536.090 in the Meadowbrook Country Club case, supra, was substantially the same as A.R.S. § 41-1011.

In view of the failure to raise

the federal issue prior to the motion for rehearing in the Arizona Supreme Court and since this is merely an interlocutory proceeding that is not final within the meaning of 28 U.S.C. §1257, the court should deny this petition for a writ of certiorari.

II. Question Presented Has Been Decided Adversely to Petitioners by the United States Supreme Court.

The petitioners have contended that this writ should be granted because the decision of the Arizona Supreme Court violates fundamental notions of fairness and due process. Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Matthews v. Eldridge, 424 U.S. 319, 334 (1976). The required degree of procedural safeguards applicable to administrative proceedings varies directly with the

importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances. Frost v. Weinberger, 515 F.2d 57 (1975), cert. denied 424 U.S. 958.

The purpose of findings of fact and conclusions of law is to guarantee that cases will be decided on the basis of the law and the evidence rather than arbitrarily and where review is provided for to facilitate the work for the reviewing tribunal by apprising it of the basis of the decision. Saginaw Broadcasting Company v. Federal Communications Commission, 96 F.2d 554 (1938). In this case findings of fact and conclusions of law by the Tax Commission were not necessary in order to guarantee a proper decision because

A.R.S. § 43-177(c) (See Appendix, p. 17) required the notice of additional assessment to set out the reasons for the proposed additional assessment and a computation thereof and because A.R.S. § 43-177(f) provided for a de novo trial for taxpayers dissatisfied with the Tax Commission's decision.

In the ordinary case where the court reviews the record of an administrative agency, findings of fact and conclusions of law are necessary in order for the court to determine whether or not the decision of the administrative agency was proper. Where the court's function is to try the matter de novo rather than to review the record before the administrative agency, findings of fact and conclusions of law are not necessary to facilitate the work of the court. The

general principles of the above cited cases indicate that due process does not require unnecessary safeguards and in this case findings of fact and conclusions of law by the Tax Commission would have such slight value that they could hardly be considered necessary.

This Court has had occasion to consider what due process requires in the context of a situation where there was further opportunity for a full hearing as in this case. In Goldberg v. Kelly, 397 U.S. 254, 271 (1970), the court concluded that the fundamental requirements of due process in this type of situation did not include formal findings of fact and conclusions of law. There is nothing in the record to indicate that these mining companies need greater procedural safeguards than

welfare indigents did in cases where there was a further opportunity for a full hearing.

Petitioners cited Panama Refining Co. v. Ryan, 293 U.S. 388 (1934); Wichita R.R. & Light Co. v. Public Utilities Comm. of State of Kansas, 260 U.S. 48, 59 (1922); and Mahler v. Zebey, 264 U.S. 332 (1924) in support of their contention that due process requires findings of fact by administrative agencies as a matter of constitutional law. Those cases are distinguishable from this case because there was a failure to make specific findings that were required by specific statutes in those cases. For example, there is no statute in this case comparable to the Kansas statutes which required a finding that rates were unreasonable as a condition precedent to the fixing of new rates.

CONCLUSION

On the basis of the foregoing points and authorities the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General

/s/
JAMES D. WINTER
Assistant Attorney General

Attorneys for Respondents

APPENDIX

A.R.S. §12-911. POWERS OF TRIAL COURT.

A. The superior court may:

1. With or without bond, unless required by the statute under authority of which the administrative decision was entered, and before or after answer, stay the decision in whole or in part pending final disposition of the case, after notice to the agency and for good cause shown, except that the court shall not stay an administrative decision wherein unemployment, compensation benefits have been allowed to a claimant pursuant to title 23, chapter 4.
2. Make any order that it deems proper for the amendment, completion or filing of the record of the proceedings of the administrative agency.
3. Allow substitution of parties by reason of marriage, death, bankruptcy, assignment or other cause.
4. Dismiss parties or realign parties plaintiff and defendant.
5. Modify, affirm or reverse the decision in whole or in part.
6. Specify questions or matters requiring further hearing or proceedings and give other proper instructions.
7. When a hearing has been held by the agency, remand for the purpose of taking additional evidence when from the state of the record of the administrative agency or otherwise it appears that such action is just.
8. In the case of affirmance or partial affirmance of an administrative decision requiring payment of money, enter judgment for the amount justified by the record and for costs, upon which execution may issue.

B. Technical errors in the proceedings before the administrative agency or its failure to observe technical rules of evidence shall not constitute grounds for reversal of the decision, unless it appears to the trial court that the

error or failure affected the rights of a party and resulted in injustice to him.

C. On motion of a party before rendition of judgment, the trial court shall make findings of fact and state conclusions of law upon which its judgment is based.

* * * *

A.R.S. § 43-177. PAYMENTS AND ASSESSMENTS - DEFICIENCY ASSESSMENTS

. . .

(c) NOTICE OF ADDITIONAL ASSESSMENT. If the tax commission determines that the tax disclosed by the original return is less than the tax disclosed by its examination, it shall mail notice or notices to the taxpayer of the deficiency proposed to be assessed.

(1) NOTICE, CONTENTS. Each notice shall set forth the reasons for the proposed additional assessment and the computation thereof.

(2) NOTICE, JOINT RETURNS. In the case of a joint return filed by husband and wife, the notice of deficiency may be a single joint notice, except that if the tax commission is notified by either spouse that separate residences have been established, it shall mail to each spouse, in lieu of the single joint notice, duplicate originals of the joint notice.

. . .

(e) PROTEST, WHEN TO BE FILED. Within ninety days after the mailing of each notice of additional tax proposed to be assessed the taxpayer may file with the tax commission a written protest against the proposed additional tax, specifying in the protest the grounds upon which

it is based. Such written protest shall be prepared and verified in the manner prescribed by the tax commission.

(1) PROPOSED ASSESSMENTS, WHEN FINAL. If no protest is filed, the amount of the deficiency assessed becomes final upon the expiration of the ninety-day period.

(2) PROTEST, ACTION AND HEARING. If a protest is filed, the tax commission shall reconsider the assessment of the deficiency and, if the taxpayer has so requested in his protest, shall grant the taxpayer or his authorized representatives an oral hearing. Such hearing shall be held within six months from the date of receipt or written request for such hearing from the taxpayer.

(3) The provisions of this subsection shall be effective for all years beginning on or after January 1, 1970.

(f) APPEAL TO SUPERIOR COURT.

(1) After consideration of the protest and the evidence adduced in the event of such oral hearing, the tax commission's action upon the protest is final upon the expiration of thirty days from the date when it mails notice of its action to the taxpayer, unless within that thirty-day period the taxpayer appeals from the action of the tax commission to the superior court of the county wherein the taxpayer resides or, if the taxpayer does not reside in Arizona, to the superior court of Maricopa County.

(2) The superior court shall hear and determine the appeal as a trial de novo. Within sixty days after the entry of judgment either party

may appeal to the supreme court in the manner provided for appeals from the judgment of a superior court, and such appeal shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as other state cases.

* * * *

APPELLANTS' OPENING BRIEF
(pages 9 and 10)

"ARGUMENT III

A

DOES THE FAILURE TO MAKE DENOMINATED FINDINGS AND CONCLUSIONS RENDER THE RULINGS VOID?

The position of the Commission on this question is, first, that the provisions of A.R.S. § 41-1011 have no application to the rulings complained of here; but, second, that even were the statute applicable, the written record of the action taken by the Commission fully satisfied the requirement for findings and conclusions.

It is clear that the Administrative Procedure Act applied to the Tax Commission as it then existed. The question is therefore this: Did A.R.S. § 41-1011 require that the Commission make specific Findings and Conclusions <u>in these cases</u>? The statute reads:

> <u>Unless otherwise provided by law</u>, any final decision or order adverse to a party in a contested case shall be in writing or stated in the record. Any final decision shall include findings

> of fact and conclusions of law separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings . . . .

The answer is found in the words of the statute, "Unless otherwise provided by law . . . ." It is clear that the assessment provisions of the Income Tax Act, read as a whole, do indeed provide otherwise . . . ."

CERTIFICATE OF SERVICE

I hereby certify that on this 3 day of January, 1978, three copies of the BRIEF OF RESPONDENTS IN OPPOSITION TO [illegible]TION FOR CERTIORARI were mailed postage prepaid to:

LESLIE T. JONES, JR.
DEAN C. SHORT,II
Evans Kitchel & Jenckes
363 North 1st Avenue
Phoenix, Arizona 85003
Attorneys for Phelps Dodge and ASARCO,Inc.

JAMES R. MALOTT, JR.
Morris & Malott
P.O. Box 351
Globe, Arizona 85501
Attorneys for Cities Service Company

DAVID W. RICHTER
Bilby Shoenhair Warnock & Dolph
2 East Congress
Tucson, Arizona
Attorneys for Duval Corporation

G. HENRY LADENDORFF
Ladendorff & Ridge
34 West Monroe
Suite 500
Phoenix, Arizona
Attorneys for Inspiration Consolidated Copper Co.

I further certify that all parties required to be served have been served.

BRUCE E. BABBITT
Attorney General

/s/
JAMES D. WINTER

Subscribed and sworn to before me this 3 day of January, 1978.

/s/Leigh Cheatham
Notary Public

My Commission expires:
9-30-81